A

ALBILT RESOURCES SDN BHD

v.

CASARIA CONSTRUCTION SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABDUL MALIK ISHAK JCA
T SELVENTHIRANATHAN JCA
[CIVIL APPEAL NO: J-02(IM)-157-2009]

C

30 SEPTEMBER 2009

ARBITRATION: *Stay of proceedings - Application - Whether clear and unequivocal intention to arbitrate - Arbitration clause in Pertubuhan Akitek Malaysia Contract expressly incorporated into agreement -*

D

Agreement to arbitrate existed - Mandatory for court to stay proceedings pending arbitration - Arbitration Act 2005, ss. 9, 10

WORDS AND PHRASES: *"shall" - Arbitration Act 2005, s. 10 - Meaning "directory" or "mandatory"*

E

The defendant, as the main contractor, had appointed the plaintiff as its sub-contractor *via* a letter of award dated 4 June 2004 ('the June contract') for certain construction works. Pursuant to the June contract, the plaintiff claimed for a sum of RM334,273.37 from the defendant. Upon receiving the plaintiff's writ and statement of claim,

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and before filing the defence, the defendant applied for a stay, pending arbitration. The defendant's counsel raised the issue that in cl. 1 of the June contract ('cl. 1') and cl. 9 of the contract between the defendant and the Employer ('cl. 9'), the word "executed" meant "signed". Clause 1 provided as follows: "This contract is

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executed based on the terms and conditions as stipulated in the contract document between Albilt Resources Sdn Bhd (hereinafter called "The Main Contractor") and Redez Properties Sdn Bhd (hereinafter called "The Employer") and all correspondence including the Letter of Award between the Main Contractor and

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The Employer." Clause 9 provided as follows: "The contract executed will be based on the terms and conditions as stipulated in the contract document between Albilt Resources Sdn Bhd (hereinafter called "the Main Contractor") and Redez Properties Sdn Bhd (hereinafter called "The Employer"). The contract shall be

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based on the Agreement and Conditions of Building Contract

(Without Quantities) published by Pertubuhan Akitek Malaysia ("PAM Contract"), together with amendments, additions or modifications as mentioned above." Therefore the defendant claimed that under s. 9 of the Arbitration Act 2005 ('the Act'), the true construction of cl. 1 and cl. 9 would lead to the conclusion that the June contract was subject to an arbitration agreement. On the other hand, the plaintiff's counsel took the position that the word "executed" in cl. 1 and cl. 9 meant "implemented, performed or carried out" and not "signed". He therefore disputed the existence of an arbitration agreement. The learned judicial commissioner held that the June contract was not subject to an arbitration agreement and so declined to refer the dispute to arbitration. Hence, the present appeal.

Held (allowing the defendant's appeal)
Per Low Hop Bing JCA:

(1) The word "executed" in the present context meant "made or brought into existence". The June contract had been "executed" *ie*, signed, sealed and delivered or brought into existence by the parties concerned. The parties, having "executed" the June contract, had in effect adopted and incorporated all the other relevant documents specifically stipulated therein, including the PAM Contract. (paras 16 & 17)

(2) When all the documents were construed conjunctively, it was abundantly clear that the terms of the PAM Contract had been incorporated as part and parcel of the June contract. Clause 34 of the PAM Contract, which sets out the arbitration clause, clearly came within the meaning of "arbitration agreement" in s. 9(1). (paras 20 & 23)

(3) The parties, who made a contract to arbitrate their disputes, should be held to their bargain. It is the *prima facie* duty of the court to act upon such an arbitration agreement. The defendant's position, in seeking to stay the proceedings in the High Court and to refer the disputes or differences to arbitration, was further strengthened by s. 10 of the Act. As the June contract had been shown to be subject to an arbitration agreement and the exceptions under s. 10(1) were inapplicable, the peremptory language, especially the word "shall" contained

A in s. 10(1), made it mandatory for the court proceedings to be stayed. The learned judicial commissioner therefore erred in dismissing the defendant's application. (paras 33-37)

Per Abdul Malik Ishak JCA:

B **(1)** Section 10 of the Act imposes a mandatory obligation to stay the proceedings and refer the parties to arbitration. The word "shall" that appears in s. 10 must necessarily mean "directory" or "mandatory". (para 43)

C **(2)** No specific words or forms are required to be used or filled in order to constitute an arbitration clause or an arbitration agreement. Even an electronic transmission referring to or implying the parties' intention to submit to arbitration would be sufficient to attract arbitration. What is of importance is that D there must be an agreement to refer disputes to arbitration. The intention to arbitrate must be clear and unequivocal. When there is a clear intention to arbitrate, effect must be given to it notwithstanding that the arbitration clause is incomplete or it lacks certain particulars. (para 55)

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Per T Selventhiranathan JCA:

(1) The defendant need not even have sought to invoke the inherent jurisdiction of the court under O. 92 r. 4 of the Rules F of the High Court 1980 in the alternative to grant the application for the stay of proceedings as there was ample provision therefor under s. 10. When there is a provision in a law which is clearly intended to encapsulate a given situation, there is no need to seek recourse to the inherent jurisdiction of G the court. (para 65)

(2) The agreement itself need not have an arbitration clause in it as long as the agreement refers to an arbitration clause in another document and the agreement is in writing and the reference incorporates the said clause into the agreement. H (para 66)

Bahasa Malaysia *Translation Of Headnotes*

Defendan, sebagai kontraktor utama, telah melantik plaintif sebagai I kontraktor bawahannya melalui suatu surat award bertarikh 4 Jun 2004 ('kontrak Jun') untuk beberapa kerja-kerja pembinaan. Menurut kepada kontrak Jun, plaintif menuntut jumlah sebanyak

RM334,273.37 dari defendan. Setelah menerima writ dan pernyataan tuntutan plaintif, dan sebelum memfailkan pembelaan, defendan memohon untuk suatu penangguhan, sementara menantikan timbangtara. Peguam defendan membangkitkan isu bahawa dalam kl. 1 kontrak Jun dan kl. 9 kontrak di antara defendan dan majikan ('kl. 9'), perkataan "dilaksanakan" bermaksud "ditandatangan". Klausa 1 menyediakan seperti berikut: "Kontrak ini dilaksanakan berasaskan terma-terma dan syarat-syarat seperti yang dinyatakan dalam kontrak dokumen di antara Albilt Resources Sdn Bhd (selepas ini dipanggil "Kontraktor Utama") dan Redez Properties Sdn Bhd (selepas ini dipanggil "Majikan") dan semua persuratan termasuk Surat Award di antara Kontraktor Utama dan Majikan." Klausa 9 menyediakan seperti berikut: "Kontrak yang dilaksanakan akan berasaskan terma-terma dan syarat-syarat seperti yang dinyatakan dalam kontrak dokumen di antara Albilt Resources Sdn Bhd (selepas ini dipanggil "Kontraktor Utama") dan Redez Properties Sdn Bhd (selepas ini dipanggil "Majikan"). Kontrak akan berasaskan Perjanjian dan Syarat-Syarat Kontrak Bangunan (Tanpa Kuantiti) yang diterbitkan oleh Pertubuhan Akitek Malaysia ("Kontrak PAM"), bersama-sama dengan pindaan, tambahan atau modifikasi seperti yang dinyatakan di atas." Oleh itu defendan menghujah bahawa di bawah s. 9 Akta Timbangtara 2005 ('Akta'), pentafsiran sebenar kl. 1 dan kl. 9 akan membawa kepada kesimpulan bahawa kontrak Jun tertakluk kepada perjanjian timbangtara. Sebaliknya, peguam plaintif mendakwa bahawa perkataan "dilaksanakan" dalam kl. 1 dan kl. 9 bermaksud "digunakan, dilakukan atau dilaksanakan" dan bukan "ditandatangan". Beliau oleh yang demikian mempertikaikan kewujudan suatu perjanjian timbangtara. Yang arif pesuruhjaya kehakiman memutuskan bahawa kontrak June tidak tertakluk kepada perjanjian timbangtara dan oleh itu enggan merujuk pertikaian tersebut untuk ditimbangtara. Oleh yang demikian, rayuan semasa.

Diputuskan (membenarkan rayuan defendan)
Oleh Low Hop Bing HMR:

(1) Perkataan "dilaksanakan" dalam konteks semasa bermaksud "dibuat atau diwujudkan". Kontrak Jun telah "dilaksanakan", iaitu, ditandatangan, dimeterai dan disampaikan atau diwujudkan oleh pihak-pihak yang terlibat. Pihak-pihak tersebut, setelah "melaksanakan" kontrak Jun, telah menggunakan dan menggabungkan semua dokumen-dokumen relevan yang lain yang dinyatakan dalamnya, termasuk Kontrak PAM.

(2) Apabila kesemua dokumen-dokumen ditafsirkan bersama-sama, ia sungguh jelas bahawa terma-terma Kontrak PAM telahpun digabungkan sebagai sebahagian kontrak Jun. Klausa 34 Kontrak PAM, yang menyediakan klausa timbangtara, jelas terangkum dalam maksud "perjanjian timbangtara" dalam s. 9(1).

(3) Pihak-pihak tersebut, yang telah membuat suatu kontrak untuk menimbangtara pertikaian mereka, seharusnya dipegang kepada janji mereka. Ia adalah tugas *prima facie* mahkamah untuk bertindak atas perjanjian timbangtara sebegitu. Kedudukan defendan, dalam cuba menangguhkan prosiding dalam Mahkamah Tinggi dan untuk merujuk pertikaian atau perselisihan untuk ditimbangtara, diperkuatkan lagi oleh s. 10 Akta. Oleh kerana kontrak Jun telah dibuktikan tertakluk kepada suatu perjanjian timbangtara dan pengecualian-pengecualian di bawah s. 10(1) Akta tidak dapat dipakai, bahasa muktamad, terutamanya perkataan "akan" yang dikandungi dalam s. 10(1), menjadikannya mandatori bagi prosiding mahkamah ditangguhkan. Yang arif pesuruhjaya kehakiman oleh itu khilaf apabila menolak permohonan defendan.

Oleh Abdul Malik Ishak HMR:

(1) Seksyen 10 Akta mengenakan suatu obligasi mandatori untuk menangguhkan prosiding dan untuk merujuk pihak-pihak kepada timbangtara. Perkataan "akan" yang terdapat dalam s. 10 mesti bermaksud "panduan" atau "mandatori".

(2) Tiada perkataan-perkataan atau bentuk-bentuk khusus yang perlu digunakan atau diisi supaya membentuk suatu klausa timbangtara atau suatu perjanjian timbangtara. Suatu transmisi elektronik yang merujuk kepada atau membayangkan niat pihak-pihak untuk menyerah kepada timbangtara sudah mencukupi untuk menarik timbangtara. Apa yang penting ialah mesti ada suatu perjanjian untuk merujuk pertikaian kepada timbangtara. Niat untuk menimbangtara mesti jelas dan nyata. Apabila terdapat niat yang jelas untuk menimbangtara, efek mesti diberi kepadanya meskipun klausa timbangtara itu tidak sempurna atau tiada beberapa butir-butir.

Oleh T Selventhiranathan HMR:

(1) Defendan tidak perlu pun menuntut untuk menggunakan bidangkuasa sedia ada mahkamah di bawah A. 92 k. 4 Kaedah-Kaedah Mahkamah Tinggi 1980 secara alternatif untuk membenarkan permohonan untuk penangguhan prosiding kerana terdapat peruntukan mencukupi di bawah s. 10. Apabila terdapat peruntukan dalam undang-undang yang nyata berniat untuk mengurung sesuatu situasi tertentu, tidak perlu untuk menuntut penggunaan bidangkuasa sedia ada mahkamah.

(2) Perjanjian tersebut tidak perlu mempunyai suatu klausa timbangtara dalamnya asalkan perjanjian tersebut merujuk kepada suatu klausa timbangtara dalam dokumen lain dan perjanjian tersebut adalah bertulis dan rujukan itu menggabungkan klausa itu ke dalam perjanjian tersebut.

Case(s) referred to:

Baker v. Yorkshire Fire and Life Assurance [1892] QB 144 ***(refd)***

Borneo Samudera Sdn Bhd v. Siti Rahfizah Mihaldin & Ors [2008] 5 CLJ 435 CA ***(refd)***

Brightside Mechanical & Electrical Services Group Ltd & Anor v. Hyundai Engineering & Construction Co Ltd [1988] 1 CLJ 714; [1988] 2 CLJ (Rep) 712 HC ***(refd)***

Chut Nyak Isham Nyak Ariff v. Malaysian Technology Development Corporation Sdn Bhd & Ors [2009] 9 CLJ 32 HC ***(refd)***

CMS Energy Sdn Bhd v. Poscon Corporation [2008] 1 LNS 543 HC ***(refd)***

Connelly v. Director of Public Prosecutions [1964] AC 1254 ***(refd)***

Corporacion Transnacional de Inversiones SA de CV v. Stet International SpA [1999] 45 OR (3d) 183 ***(refd)***

Innotec Asia Pacific Sdn Bhd v. Inotec GMBG [2007] 8 CLJ 304 HC ***(refd)***

Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors [1989] 3 MLJ 164 SC ***(refd)***

Lee Brothers Construction Co v. Teh Teng Seng Realty Sdn Bhd [1988] 1 MLJ 459 ***(refd)***

Lim Su Sang v. Teck Guan Construction & Development Co Ltd [1965] 1 LNS 97 FC ***(refd)***

Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee) [1989] 1 LNS 140 HC ***(refd)***

Majlis Ugama Islam dan Adat Resam Melayu Pahang v. Far East Holdings Bhd & Anor [2007] 10 CLJ 318 HC ***(refd)***

Malaysian Newsprint Industries Sdn Bhd v. Perdana Cigna Insurance Bhd & Ors [2008] 1 CLJ 246 CA ***(refd)***

Morello Sdn Bhd v. Jacques (International) Sdn Bhd [1995] 2 CLJ 23 FC

Morgan v. (W) Harrison Ltd [1907] 2 Ch 137 ***(refd)***

Misery Babulal Tulsidas v. Sayla Gram Panchayat, District Surendranagar AIR [1971] Guj 96 ***(refd)***

Ng Khong Lim v. Nancy Teo [1985] 1 LNS 51 CA ***(refd)***
Oonc Lines Ltd v. Sino-American Trade Advancement Co Ltd [1994] HKCU 35 SC ***(refd)***
Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC ***(refd)***
Pekeliling Triangle Sdn Bhd & Anor v. Chase Perdana Bhd [2003] 1 CLJ 153 CA ***(refd)***
Re CHS [2001] 8 CLJ 653 HC ***(refd)***
Sebor (Sarawak) Marketing & Services Sdn Bhd v. SA Shee (Sarawak) Sdn Bhd [2000] 1 LNS 15 HC ***(refd)***
Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 SC ***(refd)***
Schuler (L) AG v. Wickman Machine Tools Sales Ltd [1974] AC 235 ***(refd)***
Smith v. Cammell, Laird And Company, Limited [1940] AC 242 ***(refd)***
Standard Chartered Bank Malaysia Bhd v. City Properties Sdn Bhd & Anor [2008] 1 CLJ 496 HC ***(refd)***
Stylo Shoes Ltd v. Prices Tailors Ltd [1960] 2 WLR 8 ***(refd)***
Sunway Damansara Sdn Bhd v. Malaysia National Insurance Bhd & Anor [2008] 3 MLJ 872 ***(refd)***
Terrapin International Ltd v. Inland Revenue Commissioner [1976] 2 All ER 471 ***(refd)***
The Liverpool Borough Bank v. Turner [1860] 45 ER Ch 715 ***(refd)***
Woh Hup Pte Ltd v. Property Development Ltd [1991] 2 CLJ 1260; [1991] 4 CLJ (Rep) 1174 HC ***(refd)***
Woodward v. Sarsons And Sadler [1874-75] 10 LRCP 733 ***(refd)***
Yomeishu Seizo Co Ltd & Ors v. Sinma Medical Products (M) Sdn Bhd [1996] 2 BLJ 142 HC ***(refd)***

Legislation referred to:
Arbitration Act 1952, ss. 2, 6
Arbitration Act 2005, ss. 1(2), 9(1), (2), (3), (4)(a), (b), (5), 10(1)
Rules of the High Court 1980, O. 92 r. 4

For the appellant - Justin Voon (Alvin Lai with him); M/s Sidek Teoh Wong & Dennis
For the respondent - HK Yoong; M/s HK Yoong

[Appeal from High Court, Johor Bahru; Suit No: MT1-22-801-2006]

Reported by Amutha Suppayah

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] This appeal was lodged against the decision of the Johor Bahru High Court in dismissing the appellant's ("the defendant's") summons in chambers which sought, *inter alia*, an order that the respondent's ("the plaintiff's") claim for RM334,273.37 be stayed and referred to arbitration.

[2] On 6 July 2009, we allowed the defendant's appeal. Our grounds are set out below.

Factual Background

[3] The factual background is simple and straightforward.

[4] The plaintiff's claim consists of two separate causes of action, based on two different sub-contracts awarded by the defendant, *viz*:

(1) Letter of award dated 4 June 2004 ("the June contract") for the construction of two show units of double-story semi-detached houses and one unit of sales pavilion; and

(2) Letter of award dated 19 August 2004 ("the August contract") for external sewerage works.

[5] The defendant is the main contractor of Redez Properties Sdn Bhd ("the employer"). The defendant had in turn appointed the plaintiff as its sub-contractor.

[6] Pursuant to the two sub-contracts, the plaintiff prays for the total sum of RM445,843.29, of which a sum of RM334,273.37 is for the June contract; while the balance of RM111,569.92 is for the August contract.

[7] Upon receiving the plaintiff's writ and statement of claim, and before filing the defence on 11 December 2006, the defendant took immediate steps on 8 December 2006 to apply for a stay, pending arbitration, of the claim for RM334,273.37 under the June contract only.

[8] The defence, filed by the defendant on 11 December 2006, is in relation to the plaintiff's claim based on the August contract which is not subject to an arbitration agreement.

[9] It is to be noted that only the June contract is the subject matter of the High Court summons in chambers and now in the instant appeal.

Arbitration Agreement

[10] The defendant's learned counsel Mr Justin Voon (assisted by Mr Alvin Lai) raised the issue that in cl 1 of the June contract ("cl. 1") and cl. 9 of the contract between the defendant and Redez Properties Sdn Bhd ("cl. 9"), the word "executed" means "signed". They relied on s. 9 of the Arbitration Act 2005 in support of their contention that the true construction of cl. 1 and cl. 9 would lead to the conclusion that the June contract is subject to an arbitration agreement. (A reference hereinafter to a section is a reference to that section in the Arbitration Act 2005).

[11] Mr H K Yoong, the plaintiff's learned counsel, took the position that the word "executed" in cl. 1 and cl. 9 means "implemented, performed or carried out" and not "signed". He disputed the existence of an arbitration agreement.

[12] In the court of first instance, the learned judicial commissioner held that the June contract was not subject to an arbitration agreement and so declined to refer the dispute to arbitration.

[13] We have identified the question for determination in the instant appeal as follows:

> Upon the true construction of cl. 1 and cl. 9, and having regard to s. 9, is the June contract subject to an arbitration agreement?

[14] The answer to the above question makes it necessary to reproduce the relevant portions of cl. 1 and cl. 9 as follows:

> Cl. 1: This contract **executed** based on the terms and conditions as stipulated in the contract document between Albilt Resources Sdn Bhd (hereinafter called "The Main Contractor") and Redez Properties Sdn Bhd (hereinafter called "The Employer") and all correspondence including the Letter of Award between the Main Contractor and The Employer. (emphasis added)

> Cl. 9: The contract **executed** will be based on the terms and conditions as stipulated in the contract document between Albilt Resources Sdn Bhd (hereinafter called "the Main Contractor") and Redez Properties Sdn Bhd (hereinafter called "The Employer").

> The contract shall be based on the Agreement and Conditions of Building Contract (Without Quantities) published (sic "by") Pertubuhan Akitek Malaysia ("PAM Contract"), together with amendments, additions or modifications as mentioned above. (emphasis added)

[15] First of all, it is appropriate for us to deal with the meaning of the word "executed". A plain reading thereof reveals that the word is used respectively in relation to the two contracts expressly contained therein. We are of the view that in that context, the word "executed" means "made or brought into existence" eg, a contract by going through the formalities necessary to the validity thereof: see *Misery Babulal Tulsidas v. Sayla Gram Panchayat, District Surendranagar* AIR [1971] Guj 96; AIR [1971] Guj 101. By way of illustration, the execution of a deed is a process which consists of signature, sealing and delivery unconditionally: per Walton J in *Terrapin International Ltd v. Inland Revenue Commissioner* [1976] 2 All ER 471, 466.

[16] In the instant appeal, the June contract was awarded by the defendant to the plaintiff. It was signed by the defendant's director, and supported by all the terms and conditions stipulated therein, which had been acknowledged and accepted by the plaintiff's director and manager; both of them have also signed the "Acknowledgment and Acceptance" form. In our view, there is no doubt that the June contract has been "executed" ie, signed, sealed and delivered or brought into existence by the parties concerned.

[17] The plaintiff and the defendant, having "executed" the June contract, had in effect adopted and incorporated all the other relevant documents specifically stipulated therein, including the PAM Contract. In other words, by the June contract, they had expressly agreed to be bound by a series of documents *viz*:

(1) Under cl 1, the letter of award dated 4 June 2004 which is based on:

   (a) the terms and conditions as stipulated in the contract document between the Main Contractor, Albilt Resources Sdn Bhd (ie, the defendant) and Redez Properties (ie, the employer); and

   (b) all correspondence including the Letter of Award between the defendant and the employer.

(2) Under cl 9, the terms and conditions as stipulated in the contract document between the defendant and the employer; and that in turn shall be based on the PAM Contract, together with amendments, additions or modifications.

[18] Clause 1 and cl. 9 must be construed liberally in line with the grammatical and ordinary meaning or the plain purpose of the words used by the parties, with necessary modification in order to avoid absurdity, inconsistency or repugnancy: see eg, *Malaysian Newsprint Industries Sdn Bhd v. Perdana Cigna Insurance Bhd & Ors* [2008] 1 CLJ 246 CA, per Suriyadi Halim Omar JCA; *"The Interpretation of Contracts"* by Kim Lewinson, Sweet & Maxwell 1989; *Morello Sdn Bhd v. Jacques (International) Sdn Bhd* [1995] 2 CLJ 23 HC; *Schuler (L) AG v. Wickman Machine Tools Sales Ltd* [1974] AC 235; [1973] 2 All ER 39; [1973] 2 WLR 683 HL; *Brightside Mechanical & Electrical Services Group Ltd & Anor v. Hyundai Engineering & Construction Co Ltd* [1988] 1 CLJ 714; [1988] 2 CLJ 712 HC; *Ng Khong Lim v. Nancy Teo* [1985] 1 LNS 51 CA Singapore; and *Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164, 165 SC per Hashim Yeop A Sani CJ (M) (as he then was).

[19] We also opine that the word "correspondence" in cl. 1 should be construed to include all correspondence including the Letter of Award between the Main Contractor and the Employer. It is trite law that a contract can come into being from the exchange of correspondence ie, by way of letters. The Letter of Award containing the June contract is obviously a contract which was brought into being *via* correspondence.

[20] When all the aforesaid documents are construed conjunctively, it is abundantly clear that the terms of the PAM Contract have been incorporated as part and parcel of the June contract.

[21] It has not been disputed that cl. 34 of the PAM Contract expressly provides for an arbitration clause which is to be applied mutatis mutandis to the June contract.

[22] The true construction of the PAM Contract brings into focus s. 9 which merits reproduction *in extenso* as follows:

(1) In this Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) *An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.*

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing where it is contained in:

(a) a document signed by the parties;

(b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or

(c) an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(5) *A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.* (emphasis added)

[23] Under s. 9(1), "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Clause 34 of the PAM Contract, which sets out the arbitration clause, clearly comes within the meaning of "arbitration agreement" in s. 9(1).

[24] Section 9(2) allows an arbitration agreement to be "in the form of an arbitration clause in an agreement or in the form of a separate agreement," such as the PAM Contract herein.

[25] Section 9(3) requires an arbitration agreement to be in writing.

[26] Under s. 9(4), an arbitration agreement in writing may be contained in the documents enumerated therein, *viz*:

(a) a document signed by the parties;

(b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or

(c) an exchange of the statement of claim and of the defence in which the existence of an agreement is alleged by one party and not denied by the other.

[27] The June contract and the documents expressly incorporated therein have clearly satisfied the requirement of being in writing under s. 9(3) and are contained in the documents as specified in s. 9(4)(a) and (b).

[28] Section 9(5) provides that a reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement. This again has been fulfilled in cl. 34 of the PAM Contract, which has been referred to and adopted in the employer's letter which has been similarly adopted in the June contract.

[29] In Hong Kong, the existence of a written arbitration agreement can be evidenced by written communications exchanged between the parties, even though one party has never signed the agreement containing the arbitration clause: *Oonc Lines Ltd v. Sino-American Trade Advancement Co Ltd* [1994] HKCU 35 SC (HK): and see also "The annotated Statutes of Malaysia" (2006 Issue) p. 103 published by LexisNexis.

[30] In England, it is not necessary that in all cases the written agreement to refer the matter to arbitration must be signed by both parties: see *Baker v. Yorkshire Fire and Life Assurance* [1892] QB 144 at 147 per Al Smith J (the assured affirmed his contract by suing on the policy, and was bound by an arbitration clause although he had not signed the policy) *ibid*, p. 104. And an arbitration agreement may be deduced from correspondence between the parties: *Morgan v. (W) Harrison Ltd* [1907] 2 Ch 137 CA: *ibid* p. 104.

[31] In Canada, parties may enter into a valid arbitration agreement by entering into a contract that incorporates by reference another document that provides for arbitration: *Corporacion Transnacional de Inversiones SA de CV v. Stet International SpA* [1999] 45 OR (3d) 183; affd [2000] 49 OR (3d) 414 CA (Ont, Can): *ibid*, p. 105.

[32] Within our shores, a written agreement for arbitration can be deduced from the minutes recording the agreement and the written acceptance by the arbitrator of his appointment: *Sebor (Sarawak) Marketing & Services Sdn Bhd v. SA Shee (Sarawak) Sdn Bhd* [2000] 1 LNS 15; [2000] 6 MLJ 1 at 7, Ian Chin J (as he then was), *ibid*, p. 104.

[33] Reverting to the mainstream of the instant appeal, where disputes or differences have arisen between the parties pursuant to the June contract, as is evident in paras 15 to 20 of the first affidavit of Wong Chi Weng affirmed on 7 December 2006 for the defendant, the proper course for the plaintiff to take is to refer these disputes to arbitration in accordance therewith, as the plaintiff has the legal obligation to abide by the terms of the June contract. The parties, who made a contract to arbitrate their disputes, should be held to their bargain. This proposition is supported by high authority: eg, *Pekeliling Triangle Sdn Bhd & Anor v. Chase Perdana Bhd* [2003] 1 CLJ 153 CA; *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716 and the authorities cited therein.

[34] It is the *prima facie* duty of the court to act upon such an arbitration agreement: *Lee Brothers Construction Co v. Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459 as applied in *Pekeliling Triangle Sdn Bhd, supra.*

[35] The defendant's position, in seeking to stay the proceedings in the High Court and to refer the disputes or differences to arbitration, is further strengthened by s. 10 which reads as follows:

> **10. Arbitration agreement and substantive claim before court**
>
> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds:
>
> (a) that the agreement is null and void, inoperative or incapable of being performed; or
>
> (b) that there is in fact no dispute between the parties with regard to the matters to be referred.
>
> (2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.
>
> (3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

[36] As the June contract has been shown to be subject to an arbitration agreement and the exceptions under s. 10(1) are inapplicable, the peremptory language especially the word "shall" contained in s. 10(1) makes it mandatory for the court proceedings to be stayed. Authorities supporting this proposition include:

(1) *Borneo Samudera Sdn Bhd v. Siti Rahfizah bt Mihaldin & Ors* [2008] 5 CLJ 435 CA;

(2) *Innotec Asia Pacific Sdn Bhd v. Inotec GMBG* [2007] 8 CLJ 304 HC;

(3) *Standard Chartered Bank Malaysia Bhd v. City Properties Sdn Bhd & Anor* [2008] 1 CLJ 496 HC;

(4) *Sunway Damansara Sdn Bhd v. Malaysia National Insurance Bhd & Anor* [2008] 3 MLJ 872;

(5) *CMS Energy Sdn Bhd v. Poscon Corporation* [2008] 1 LNS 543 HC; and

(6) *Chut Nyak Isham Nyak Ariff v. Malaysian Technology Development Corporation Sdn Bhd & Ors* [2009] 9 CLJ; 32 HC.

Conclusion

[37] It is abundantly clear to us that the answer to the above question is in the affirmative. The plaintiff's claim based on the June contract should have been stayed pending arbitration. The learned judicial commissioner has therefore erred in dismissing the defendant's application which sought the stay and reference to arbitration. Hence, we allowed the defendant's appeal, set aside the order of the court below and substituted it with an order that the plaintiff's claim for the sum of RM334,273.37 be stayed and referred to arbitration. Costs of RM7,000 to the defendant here and in the court below. Deposit to the defendant on account of the fixed costs.

[38] My learned brothers Abdul Malik Ishak JCA and T Selventhiranathan JCA have also prepared their judgments respectively in support of mine, and arrived at the same conclusion.

Abdul Malik Ishak JCA:

[39] The well written judgment of my learned brother Low Hop Bing, JCA in setting out the facts and the law has greatly assisted me in writing this supporting judgment. The parties shall be referred

to in the same manner as his Lordship Low Hop Bing, JCA has done and this supporting judgment centres on the June contract and not the August contract.

[40] By way of a summons in chambers, the defendant (Albilt Resources Sdn Bhd) sought an order that the plaintiff's claim (Casaria Construction Sdn Bhd) for the June contract amounting to RM334,273.37 be stayed and referred to arbitration. It is the stand of the defendant that the June contract is subject to arbitration, where any dispute or difference shall be referred to arbitration.

[41] The terms of the PAM agreement have been incorporated into the terms of the June contract. It is not disputed that all PAM agreements have an abitration clause.

[42] Upon receipt of the writ and the statement of claim, the defendant took immediate steps to apply for a stay by way of a summons in chambers in relation to the June contract. This was on 8 December 2006. And the defendant filed its defence on 11 December 2006 in relation to the August contract which is not subject to an arbitration agreement.

[43] In seeking a stay of the June contract and thereafter to refer the disputes or differences thereunder to arbitration, the defendant invoked se. 10 of the Arbitration Act 2005 (Act 646) and/or the inherent jurisdiction of the court. It is rather unfortunate that the learned judicial commissioner did not give effect to s. 10 of the same Act nor did he invoke the inherent jurisdiction of the court when deliberating upon the defendant's summons in chambers' application. My learned brother Low Hop Bing, JCA has reproduced verbatim s. 10 of the same Act and I do not propose to reproduce that section in this judgment. Suffice for me to say that s. 10 of the same Act imposes a mandatory obligation to stay the proceedings and refer the parties to arbitration. The word "shall" that appears in s. 10 of the same Act must necessarily mean "directory" or "mandatory" (*Stylo Shoes Ltd v. Prices Tailors Ltd* [1960] 2 WLR 8). In *Smith v. Cammell, Laird And Company Limited* [1940] AC 242, HL, at p. 258, Lord Atkin spoke of the compulsory terms of a statute in this way:

> It is precisely in the absolute obligation imposed by statute to perform or forbear from performing a specified activity that a breach of statutory duty differs from the obligation imposed by common law, which is to take reasonable care to avoid injuring another.

[44] Coleridge CJ, in *Woodward v. Sarsons And Sadler* [1874-75] 10 LRCP 733, at pp. 746 to 747, aptly said that:

> ... an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

[45] In order to determine the real intention of the legislature in enacting s. 10 of the Arbitration Act 2005 (Act 646), one must read and understand that section in its appropriate context. A stay of the proceedings shall be imposed and the parties are required to refer the matter to arbitration when the defendant has not taken "any other steps in the proceedings." In regard to the June contract, the defendant has not taken any other steps in the proceedings before applying for the stay. The defendant, for instance, did not file its defence in regard to the June contract. Indeed this approach was recommended by Lord Campbell LC in *The Liverpool Borough Bank v. Turner* [1860] 45 ER Ch 715, at p. 718, when his Lordship said:

> No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.

[46] Invoking the inherent jurisdiction of the court is the best way to prevent injustice or to prevent an abuse of the process of the court. Order 92 r. 4 of the Rules of the High Court 1980 ("RHC") reads as follows:

> **4. Inherent powers of the Court (O. 92 r. 4)**
>
> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[47] The scope of r. 4 of O. 92 of the RHC is very wide and no precise definition can be formulated. It is part procedure and part substantive. It is exercisable by way of a summary process. It can be invoked in many ways and in relation to anyone, whether a party or not. Lord Morris of Borth-Y-Gest in *Connelly v. Director of Public Prosecutions* [1964] AC 1254, HL, at p. 1301 aptly said that:

A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.

[48] There is no reason for the learned judicial commissioner not to invoke the inherent jurisdiction of the court to assist the defendant. Way back in 1984, Edgar Joseph Jr J (as he then was) in *Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319, at p. 324 succinctly said that: "It is also clear that the inherent jurisdiction of the court includes all the powers that are necessary 'to fulfil itself as a Court of Law'; 'to uphold, to protect, and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner'."

[49] The courts in *Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee)* [1989] 1 LNS 140, in *Yomeishu Seizo Co Ltd & Ors v. Sinma Medical Products (M) Sdn Bhd* [1996] 2 BLJ 142, and in *Re CHS* [2001] 8 CLJ 653 vigorously invoked their inherent jurisdiction in order to avoid an injustice.

[50] The inherent jurisdiction of the court is part and parcel of the machinery of justice. It may be exercised in any given situation notwithstanding that there is r. 4 of O. 92 of the RHC governing the circumstances of the case. The powers conferred by r. 4 of O. 92 of the RHC are additional to and not in substitution of the powers arising out of the inherent jurisdiction of the court.

[51] The Arbitration Act 2005 (Act 646) was enacted on 30 December 2005 and it brought about wholesale reform of the arbitral regime. It was based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. The Arbitration Act 2005 (Act 646) repealed and replaced the Arbitration Act 1952 (Act 93) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (Act 320) which enacts the New York Convention dealing with the recognition and enforcement of international awards.

[52] Now s. 10 of the Arbitration Act 2005 (Act 646) provides for a mandatory stay of court proceedings where there is an arbitration agreement unless the arbitration agreement is null and void, inoperative or incapable of being performed; or that there is in fact no dispute between the parties with regard to the matters to be referred.

[53] The courts have allowed a mandatory stay for arbitrations held in Malaysia and this can be seen in the following cases:

(a) *Standard Chartered Bank Malaysia Bhd v. City Properties Sdn Bhd & Anor* [2008] 1 CLJ 496;

(b) *Sunway Damansara Sdn Bhd v. Malaysia National Insurance Bhd & Anor* [2008] 3 MLJ 872;

(c) *CMS Energy Sdn Bhd v. Poscon Corp* [2008] 6 MLJ 561;

(d) *Borneo Samudera Sdn Bhd v. Siti Rahfizah bt Mihaldin & Ors* [2008] 6 MLJ 817, CA; [2008] 5 CLJ 435, CA; and

(e) *Majlis Ugama Islam dan Adat Resam Melayu Pahang v. Far East Holdings Bhd & Anor* [2007] 10 CLJ 318.

[54] I am constrained to allow the stay of the June contract for arbitration to be conducted on the matter. The main objective of having an arbitration clause in a contract is to ensure that when a controversy arises between the parties, neither one of them is able to avoid arbitration. It goes without saying that there can be no arbitration without an effective and valid arbitration clause. The keystone to arbitration is the presence of an arbitration clause or an arbitration agreement.

[55] No specific words or forms are required to be used or filled in order to constitute an arbitration clause or an arbitration agreement. Even an electronic transmission referring to or implying the parties' intention to submit to arbitration would be sufficient to attract arbitration. What is of importance is this. That there must be an agreement to refer disputes to arbitration. That is essential. And the intention to arbitrate must be clear and unequivocal. Thus, when there is a clear intention to arbitrate, effect must be given to it notwithstanding that the arbitration clause is incomplete or it lacks certain particulars (*Lim Su Sang v. Teck Guan Construction & Development Co Ltd* [1965] 1 LNS 97, FC; and *Woh Hup Pte Ltd v. Property Development Ltd* [1991] 2 CLJ 1260; [1991] 4 CLJ 1174).

[56] Why must disputing parties resort to arbitration? The answer lies in the desire of the parties to refer to a hand-picked expert tribunal to resolve their dispute on a perceived notion that it can be conducted more proficiently, economically and expeditiously than in court. The parties perceive that arbitration would be faster and

less expensive than litigation in court. The parties also perceive that neutrality of the forum can be achieved through arbitration. Whatever their motives, we are not concerned. The June contract must be referred to arbitration. There are no two ways about it.

[57] I now make those orders like what my learned brother Low Hop Bing, JCA has done. I do so accordingly.

T Selventhiranathan JCA:

[58] I have had the opportunity of reading the judgments in draft of both my learned brothers Low Hop Bing, JCA and Abdul Malik bin Ishak, JCA and agree in the main with the reasons therein as to the decision arrived at by us. Having read those judgments, I wish to add to the reasons given by way of this supporting judgment. However, since there is a plethora of authorities cited in the judgments of my learned brothers, it suffices for me to discuss the interpretation of enacted law in this judgment.

[59] The facts of the case have been well stated by my learned brother Low Hop Bing, JCA in his judgment and I adopt them here to avoid repetition. Usage in this judgment of particular terminology shall bear the meaning it has in that judgment unless the contrary intention appears.

[60] The pivotal issue in relation to the June contract is whether the parties had intended that differences or disputes thereunder between them should be referred to arbitration.

[61] I agree with my learned brothers that by incorporating the provisions of the standard PAM contract into the June contract, the parties intended that any differences or disputes between them arising under the latter contract should be referred to arbitration.

[62] The defendant in filing its defence in respect of the plaintiff's claim under the August contract cannot be said to have submitted to the jurisdiction of the court in respect of the claim under the June contract. The August contract did not in any way incorporate the provisions of the PAM contract into its body. As such, the defendant correctly filed its defence in respect of the plaintiff's claim under the August contract.

[63] In light of the foregoing, the learned judicial commissioner was in error when he failed to give effect to s. 10 of the Arbitration Act 2005 ("section 10" and "the Act") which was enacted "to reform the law relating to domestic arbitration, provide for international arbitration, the recognition and enforcement of awards and for related matters", as stated in the long title to the Act.

[64] The Arbitration Act 1952 ("the repealed Act") was repealed by the Act and cases decided before the repeal cannot generally be accepted as laying down good case law under the Act except where they are consistent with its provisions.

[65] In my view, with respect, the defendant need not even have sought to invoke the inherent jurisdiction of the court under O. 92 r. 4 of the Rules of the High Court 1980 in the alternative to grant the application for the stay of proceedings as there is ample provision therefor under s. 10. When there is a provision in a law which is clearly intended to encapsulate a given situation, there is no need to seek recourse to the inherent jurisdiction of the court. However, the defendant in the instant case may have sought to invoke the inherent jurisdiction of the court *ex abundanti cautela* or, in other words, from an abundance or excess of caution.

[66] Section 10 is in much wider terms than s. 6 of the repealed Act which it supplanted. The Act was legislated to reform the law relating to arbitration with the intention that a party which had consensually agreed with another party to submit differences or disputes between them to arbitration should not subsequently be allowed to resile from that consensual agreement with the aim of thwarting the other party's intention of having the differences or disputes between them arbitrated, to the detriment of that other party. Furthermore, the interpretation of an arbitration agreement under s. 2 of the repealed Act was in much narrower terms than the definition of an arbitration agreement under s. 9 of the Act. Section 9(5) of the Act provides for the incorporation of an arbitration clause in a document into an agreement to constitute the latter as an arbitration agreement to which the Act shall apply. This is known as incorporation by reference. Section 9(5) of the Act reads as follows:

> (5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

It is clear from a reading of the above provision that the agreement itself need not have an arbitration clause in it as long as the agreement refers to an arbitration clause in another document and the agreement is in writing and the reference incorporates the said clause into the agreement.

[67] The Act was under gestation, I believe, for some period of time before it saw the light of day when it received the Royal Assent on 30 December 2005, was published in the Gazette on 31 December 2005 and was finally born when it came into operation, pursuant to s. 1(2) of the Act, on 15 March 2006 *vide* PU(B) 65/2006.

[68] Submission of differences or disputes to arbitration had taken off in a big way in many countries towards the latter part of the last century and is continuing into the present as an expeditious and less onerous or less cumbersome way of parties resolving differences or disputes between them without recourse to curial determination of the same. Technicalities which feature ominously in court can be minimized or done away with altogether in an arbitration.

[69] The passing of the Act evinced Malaysia's intention and determination to join the ranks of those countries where parties are wont to submit differences or disputes to arbitration and the courts have to give effect to that postulation of the legislature by interpreting the Act in accordance with the intention of the legislature.

[70] Having said that, it cannot be denied that the defendant held fast to the original intention of the parties to have any differences or disputes between them in respect of the June contract referred to arbitration through the incorporation through reference in that contract of the PAM contract. The defendant exercised due caution to preserve its rights by not filing its defence to the claim under the June contract. There was no other reason for the defendant not to do so.

[71] To my mind, the claim under the June contract is "in respect of a matter which is the subject of an arbitration agreement" to fall squarely within the first precondition to refer the matter to arbitration under s. 10(1). The defendant in the present case did not take any step in the proceedings in relation to that matter, ie the June contract, but instead filed its application for a stay, thereby fulfilling the second precondition for s. 10(1) to apply.

[72] In the foregoing circumstances the court was duty-bound to stay the proceedings in relation to the matter and refer the parties to arbitration. The only way the court could refrain from making the order for stay would be if it found, under s. 10(1)(a) or s. 10(1)(b), the following exceptions to be applicable:

(a) that the agreement is null and void, inoperative or incapable of being performed; or

(b) that there is in fact no dispute between the parties with regard to the matters to be referred.

However, the two exceptions as set out above did not arise for determination.

[73] Hence, the proceedings in relation to the plaintiff's claim predicated on the June contract should have been stayed and the matter, ie, the differences or disputes between the parties under the June contract, should have been referred to arbitration pursuant to s. 10(1). I accordingly made the orders as set out in the judgment of my learned brother Low Hop Bing, JCA.